United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matters

of

THIRD AVENUE TRANSIT CORPORATION, SURFACE TRANSPORTATION CORPORATION OF NEW YORK, WESTCHESTER STREET TRANSPORTATION COMPANY, INC., THE WESTCHESTER ELECTRIC RAILROAD COMPANY, WAKONTAS PRESS, INC.,

Debtors,

JOHNSON FARE BOX COMPANY,

Claimant-Appellant,

SURFACE TRANSPORTATION CORPORATION OF NEW YORK and THIRD AVENUE TRANSIT CORPORATION,

Appellees.

Docket Bankruptcy No. 85851

APPENDIX TO APPELLANT'S BRIEF

On Appeal from the United States District Court for the Southern District of New York

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United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matters *of* Third Avenue Transit Corporation, Surface Transportation Corporation of New York, Westchester Street Transportation Company, Inc., The Westchester Electric Railroad Company, Warontas Press, Inc. Debtors.	Bankruptcy No. 85851 Johnson Fare Box Company, Claimant

Statement Under Rule 15(b).

Between February 7, 1949 and June 10, 1949, the debtor, Surface Transportation Corporation, purchased 225 new fare boxes from Johnson Fare Box Company for $55,959.84, of which there was paid $12,426.00, leaving a balance unpaid of $43,533.84. The appellant, Johnson Fare Box Company submitted an Amended Proof of Claim, dated January 21, 1952, asking priority for the amount of its claim. The Trustee classified the claim as a non-priority claim.

The matter came on for hearing on October 22, 1956. Honorable Edward J. Dimock, in a memorandum order filed March 15, 1957, classified the liability to the extent of $42.84 as a six months' claim. He denied classification of the balance i. e. $43,491.00 as a six months' claim.

Upon stipulation and order of the Court, dated May 7, 1957, the time to file a notice of appeal was extended to May 10, 1957. Upon stipulation and order of the Court, the time to docket and file the record on appeal was extended to July 15, 1957.

Exhibit 2 on the Hearing Dated October 22, 1956, Before Dimock, J.

Amended Proof of Claim.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

P. E. GANZ of Chicago, County of Cook, State of Illinois, being duly sworn, deposes and says:

1. That he is the Vice President of Johnson Fare Box Company, a corporation organized and existing under the laws of the State of Delaware, and carrying on business at No. 4619 Ravenswood Avenue, in Chicago, County of Cook, State of Illinois, and is duly authorized to make this proof of claim on its behalf.

2. That Third Avenue Transit Corporation and Surface Transportation Corporation of New York, debtors herein, were at, before and after the filing against them of a petition for reorganization, and still are, justly and truly, indebted to said corporation in the sum of $43,728.05.

3. That the consideration of said debt is as follows: Necessary fare boxes and parts furnished by Johnson Fare Box Company to Third Avenue Transit Corporation and Surface Transportation Corporation of New York, a detailed statement of which is attached hereto and made a part hereof by incorporation and reference as Schedule "A".

4. That no part of said debt has been paid.

5. That there are no set-offs or counter-claims to said debt.

6. That said corporation does not hold, and has not, nor has any person by its order, or to deponent's knowledge, or belief, for its use, had or received, any security or securities for said debt.

Exhibit 2 on the Hearing Dated October 22, 1956, Before Dimock, J.

7. That no note or other negotiable instrument has been received for such account or any part thereof and that no judgment has been rendered thereon.

8. Deponent further says that the necessary operating equipment described in said Schedule "A" was delivered on and after June 30, 1948 and within six months prior to the filing of the petition for reorganization filed herein; and said equipment was delivered within six months prior to the filing of the amended petition for reorganization filed herein; that said equipment being necessary for the continued operation of the debtor, the debt due to Johnson Fare Box Company is entitled to priority in the time of payment over all first mortgage bond holders, adjustment income mortgage bond holders, all general creditors (except general creditors furnishing necessary equipment within six months prior to October 25, 1948, who are in the same class as this claimant) and all shareholders.

9. In addition to the claim based upon the six months' rule, the claimant further states that for a period of about eight months after the original filing of the petition and until June 21, 1949, the debtors, with the full knowledge and consent of the Court and all parties in interest, including the representatives of the respective classes of creditors, the City of New York, the Securities & Exchange Commission, and the Public Service Commission, were operating their properties in the ordinary course of business, including the purchase of the fare boxes here involved, and were in fact "in possession of" said properties. No request for the appointment of a Receiver was made until June, 1949, and even as late as June 10, 1949 the Court by order refused to appoint a Receiver but merely enjoined the debtors from engaging in "transactions not in the ordinary course of business". By said

Exhibit 2 on the Hearing Dated October 22, 1956, Before Dimock, J.

order, the Court implicitly ratified transactions prior to June 10, 1949 which *had been* in the ordinary course of business. The purchase by the debtors of the fare boxes was necessary to preserve the estate and was in the nature of "administration expenses". In view of the circumstances above stated, and since the fare boxes became a part of the property subject to the first mortgage, thus enriching the estate of the first mortgagee and the debtors without consideration, the claimant should have a priority for the amount of its claim.

P. E. Ganz,
Vice President, Johnson Fare Box Company,
Claimant.

Subscribed and sworn to before me this 21st day of January, 1952.

Mary Stritar,
Notary Public.

(Seal)

Schedule "A."

Necessary Operating Equipment, viz.: Fare Boxes and Parts furnished by JOHNSON FARE BOX COMPANY to THIRD AVENUE TRANSIT CORPORATION:

Date of Invoice	*Amount*
6/30/48	$ 278.76
7/ 7/48	282.05
7/13/48	141.24
7/16/48	7.34
7/21/48	83.68
7/23/48	33.39
8/10/48	20.17
8/17/48	390.55
8/17/48	561.26
8/25/48	53.52
8/31/48	16.03
9/ 2/48	99.66
9/ 8/48	91.82
9/17/48	97.64
9/21/48	68.22
10/ 7/48	82.62
10/ 7/48	163.26
10/13/48	52.46
10/21/48	7.34
10/28/48	72.04
11/ 4/48	141.24
11/ 4/48	46.33
11/ 4/48	141.24
11/ 5/48	79.99
11/12/48	76.19
11/17/48	274.99
11/18/48	78.87
12/23/48	289.82
12/31/48	11.98

Schedule "A".

Date of Invoice	*Amount*
1/20/49	$18.54
2/18/49	53.15
4/ 8/49	18.31
5/ 3/49	108.07
6/22/49	16.91
Total	$3,958.09

Necessary Operating Equipment, viz.: Fare Boxes and Parts furnished by JOHNSON FARE BOX COMPANY to SURFACE TRANSPORTATION CORPORATION:

Date of Invoice	*Amount*
2/ 7/49	$ 42.84
3/18/49	3,727.80
3/21/49	3,727.80
3/22/49	4,970.40
4/15/49	6,213.00
4/19/49	6,213.00
4/20/49	2,733.72
4/21/49	1,242.60
4/29/51	2,485.20
4/27/49	2,485.20
4/29/49	3,479.28
5/24/49	1,491.12
5/25/49	2,485.20
5/26/49	4,970.40
5/27/49	3,479.28
6/10/49	6,213.00
Total	$55,959.84
GRAND TOTAL	$59,917.93

Schedule "A".

PAYMENTS

THIRD AVENUE TRANSIT CORPORATION:

Date	*Amount*
11/30/48	$ 817.37
12/ 1/48	475.56
12/ 2/48	78.42
12/ 9/48	715.83
1/ 3/49	213.18
1/12/49	289.13
2/10/49	706.98
2/28/49	301.81
3/ 9/49	2.83
4/ 1/49	18.30
5/16/49	144.47
Total	$3,763.88

SURFACE TRANSPORTATION CORPORATION:

Date	*Amount*	
6/ 1/49	$12,426.00	
TOTAL PAYMENTS		$16,189.88

RECAPITULATION

Total shipments	$59,917.93	
Total payments	16,189.88	
Balance due		$43,728.05

Stipulation as to Facts.

(244)

IT IS HEREBY STIPULATED that the following statements of fact are true and that the documents hereinafter referred to may be admitted in evidence as exhibits upon the hearing without further identification, this stipulation being made solely for the purposes of this proceeding and both parties reserving all rights to object to the relevancy or materiality of any matters stated or documents referred to herein.

1. During the year 1949, the debtor, Third Avenue Transit Corporation (hereinafter called "Third Avenue") and its wholly owned subsidiaries (including Surface Transportation Corp., hereinafter called "Surface") operated a public transportation system with busses and street cars in the Boroughs of Manhattan and the Bronx, and the County of Westchester. Its operation required about 981 busses and 84 street cars to carry passengers over 68 bus lines with a total route mileage of approximately 331 miles, and 12 trolley routes with a total route mileage of 36 miles. On (245) many days over 1,000,000 revenue passengers were carried.

2. During the years 1948, 1949, and 1950, the total revenue passengers carried were as follows: 1948, 420,000,000; 1949, 355,021,901; 1950, 309,606,799.

3. On or about December 20 1911, Third Avenue Railway Co. made and delivered to Central Trust Company of New York as Trustee for the holders of First Refunding Mortgage Gold Bonds a certain first refunding mortgage (hereinafter referred to as the Trust Indenture) which covered real and personal property of Third Avenue Railway Co. as described therein and which was thereafter duly recorded as provided by law. A copy of said

mortgage is annexed hereto, marked Exhibit A, and made a part thereof.

4. On or about July 1, 1942, Third Avenue was formed by the merger and consolidation of Third Avenue Railway Co. with certain other corporations, and Third Avenue thereupon succeeded to the rights and became subject to the liabilities of Third Avenue Railway Co. under the Trust Indenture.

5. The Trust Indenture in the years 1946 to the present time was and still is in full force and effect as security for the said First Refunding Mortgage Gold Bonds issued by Third Avenue Railway Co. and therefore assumed by Third Avenue outstanding in the hands of the public in said years in the aggregate amount of about $15,000,000.

6. During the years 1948 to 1949, the Central Hanover Bank and Trust Company (now called the "Hanover Bank") succeeded Central Trust Company of New York as Indenture Trustee, and in said years was and is still duly acting as such thereunder.

7. An additional mortgage was executed by Surface to the Indenture Trustee dated March 9, 1942, and was duly recorded. A copy thereof is annexed hereto, marked (246) Exhibit B, and made a part hereof.

8. A still further additional mortgage dated March 9, 1942 was executed and delivered by Surface to Chemical Bank and Trust Company as Trustee. A copy thereof is annexed hereto, marked Exhibit C, and made a part hereof.

9. Third Avenue, or its predecessor, and Surface have been purchasing fare boxes and parts therefor from Johnson since at least the year 1936.

Stipulation as to Facts.

10. From January 1, 1940, the terms of payment for such sales have always been on the basis of thirty days net and 1% discount if payment were made within ten days, and prior thereto, the discount was 2%.

11. On June 21, 1949, the United States District Court for the Southern District of New York entered an order directing the appointment of Trustees for Third Avenue and its subsidiaries.

12. On December 23, 1948, Johnson shipped and invoiced to Third Avenue parts for fare boxes in the amount of $289.83; on December 31, 1948 in the amount of $11.98; on January 20, 1949 in the amount of $18.54; on February 18, 1949 in the amount of $53.15; on April 8, 1949 in the amount of $18.31; on May 3, 1949 in the amount of $108.07; and on June 22, 1949 in the amount of $16.91, or a total amount of $516.79. All of said invoices have been paid except invoices totaling $194.21, which still remain unpaid.

13. Johnson shipped and invoiced to Surface fare boxes on the following dates and in the following amounts:

Date	*Amount*
2/ 7/49	$ 42.84
3/18/49	3,727.80
3/21/49	3,727.80
3/22/49	4,970.40
4/15/49	6,213.00
4/19/49	6,213.00
4/20/49	2,733.72
4/21/49	1,242.60
4/26/51	2,485.20
4/27/49	2,485.20
(247) 4/29/49	3,479.28
5/24/49	1,491.12

Date	*Amount*
5/25/49	2,485.20
5/26/49	4,970.40
5/27/49	3,479.28
6/10/49	6,213.00

The aggregate amount of such purchases was $55,959.84, of which there was paid $12,426, leaving a balance unpaid of $43,533.84.

14. Until on or about September 22, 1948, the fare upon the busses of Third Avenue and Surface was 5 cents.

15. Prior to the institution of a fare higher than 5 cents, all busses operated by Surface were equipped with a so-called "J" type of fare box. These boxes were so constructed that a nickel inserted therein would register as one fare and a dime as two fares.

16. From November 28, 1948 a 7¢ fare was instituted on said busses. When such increased fare was instituted, a tray was provided for each bus upon which the passenger dropped two pennies and inserted a nickel in the fare box. Accordingly, at the end of each day's run, the bus operator was required to turn in to Surface 7¢ for each fare registered on the box. Due to unfamiliarity or thoughtlessness on the part of passengers, a certain percentage of passengers would insert the total fare in the box which then registered five fares, since a penny registered two fares, as did a dime. As a result, Division Superintendents of Surface were authorized to refund to the bus operators the amounts erroneously registered, provided the bus operator made a claim and signed an appropriate refund slip.

17. In order to offset the inevitable increase in the number of fares registered in the box by such insertion

of peanies, many bus operators adopted the practice of taking certain fares "over the box" instead of having the fares inserted in the box. In the course of several months, as a result of investigations by Inspectors of (248) Surface, a number of bus operators were suspended for this practice. The Union representing the operators protested to the management of Third Avenue and its subsidiaries that the basic cause of this trouble was the failure of the Companies to provide proper fare collection devices.

18. Third Avenue and Surface also recognized that the method of collecting the pennies in a tray imposed an additional burden on the bus operators and also slowed down the entrance of passengers into the busses.

19. Consequently Third Avenue and Surface made, a survey of the market for the most practical fare box equipment for the collection of fares involving more than one coin. They found that the Johnson fare box was the most suitable box and that it was used by the Board of Transportation in the City of New York and other privately owned bus lines in this city.

20. On February 8, 1949, as a result of such survey, Surface placed an order with Johnson for 450 fare boxes at a cost of $228 per box, plus 7% federal tax and 2% New York City sales tax if boxes were delivered for use in the City of New York.

21. At the time such order was given to Johnson, Third Avenue and its subsidiaries were using 400 of this type of fare box which had been borrowed from the City of New York for use on their lines where combination subway-bus tickets were being sold.

22. The delivery of said fare boxes was as shown in paragraph 13 above.

23. All of said fare boxes so ordered and delivered were intended for use and were used on old busses then in use as replacements for the previously used "J" boxes.

24. Following the appointment of the Trustees of (249) Third Avenue and its subsidiaries, the Trustees brought a petition dated September 2, 1949, for leave to purchase 334 additional fare boxes for Surface and 115 additional fare boxes for Debtor, Westchester Street Transportation Company, Inc. Said petition was granted by order dated September 8, 1949, and a copy thereof is annexed hereto, marked Exhibit D, and made a part hereof.

25. The fare boxes delivered prior to June 21, 1949 were for the purpose of immediate use, and not to "provide an adequate margin of reserve for boxes out of order."

26. As stated by the affidavit in support of said petition, "the need for additional boxes had been further accentuated by the recent purchase of 25 new busses by Surface for use in the City of New York" (prior to the date of the petition).

27. Johnson refused to grant Third Avenue and Surface credit for payment of said 450 fare boxes, except as stated in paragraph 10, although the same was requested on behalf of the Debtor and/or Surface.

28. The liability for payment for said boxes was a current liability of Third Avenue and/or Surface, and said claim represented a debt contracted with the expectation or intention of Johnson that it was to be paid out of the current earnings of Third Avenue and/or Surface.

29. The fare boxes so ordered and delivered were intended for and were used in the ordinary operations of the Debtor and Surface.

Stipulation as to Facts.

30. The original petition for reorganization was an involuntary one filed by creditors on October 25, 1948. Subsequently, leave to serve and file an amended petition was obtained by the petitioning creditors and was filed on or about December 7, 1948.

(250) 31. On June 20 or June 21, 1949, Third Avenue itself filed what was designated as a "Petition and Consent", which document is incorporated herein by reference.

32. On June 21, 1949 the Court entered an order directing the appointment of the Trustees, which order is incorporated herein by reference.

33. Throughout this period of eight months (since the filing of the original Petition for Reorganization) the Debtors had been under the jurisdiction of the Court. The City of New York, the Public Service Commission, The Securities & Exchange Commission, and the Court itself were fundamentally interested in the preservation of the rights of the public and/or the creditors. Throughout this period the Debtors were permitted by these bodies to continue their operations. No Receiver of Third Avenue or Surface was appointed, nor, in fact, was any application ever made for such appointment until June, 1949. After the Court was requested by the Securities & Exchange Commission in June, 1949, to appoint a Receiver, the Court refused to do so. In its order dated June 10, 1949, denying the petition for a Receiver, the Court restrained the Debtors (pending the proceedings before the Referee on the issue of their insolvency) from engaging in "any actions not in the ordinary course of business."

34. The Trustee's Proposed Plan of Reorganization describes the treatment of "six months claims" as preferred claims and describes such claims in Article I as follows:

> "Six months claims: All claims, as defined, which are entitled to priority consisting mainly of claims

for current expenses of ordinary operations incurred by the debtors without the extension of long term credit and within six months prior to the appointment of the Trustee in reorganization proceedings."

35. The following appears on page 99 of the Trustees' Report and Notice pursuant to Section 167, sub-(251) divisions 5 and 6 of Chapter X of the Bankruptcy Act. It is part of a note to the financial statements in the Section 167 Report and is as follows:

"Since Third Avenue Transit Corporation and subsidiary companies are operated to a considerable degree as a system rather than as individual companies expenditures may be made in the first instance by one company for the benefit of another or other companies. This practice has continued, and subsequent to June 21, 1949, the trustees of the various companies have made additional advances to affiliated companies or have reduced amounts previously so advanced."

Dated: October 17, 1956.

SAXE, BACON & O'SHEA
Attorneys for Trustees

LORENZ, FINN & GIARDINO
Attorneys for Johnson
Fare Box Company

Stipulation as to Facts.

Statement with respect to Exhibit mentioned in the Stipulation as to Facts, which is set forth at pages 8a to 15a herein.

Exhibit A, referred to in said Stipulation as to Facts contains, among other provisions, the following:

"NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That in order to secure the payment of the principal and interest of all said bonds at any time issued and outstanding under this indenture, according to their tenor, purport and effect, and to secure the performance of observance of all the covenants and conditions upon which such bonds are issued, received and held, and for and in consideration of the premises and of the acceptance or purchase of said bonds by the holders thereof, * * * the said THIRD AVENUE RAILWAY COMPANY, the party of the first part, has granted, bargained, sold, released, assigned, transferred and conveyed unto said CENTRAL TRUST COMPANY OF NEW YORK as Trustee, the party of the second part, its successors and assigns forever, all and singular its property, real and personal of every nature and description whatsoever, and wheresoever situated, including the following: * * *

Also any and all lines of railroad, extensions and branches, lands and improvements of any description, machinery, cars and other equipment, stock, bonds, notes and other obligations and other property of any description whatsoever, which the Railway Company may acquire by the use of bonds, or the proceeds of bonds reserved under subdivision (3) of Article Second of this indenture, or with the proceeds of any

property mortgaged or pledged hereunder, or otherwise acquired under the provisions of this indenture;

Together with all and singular the improvements thereon * * * and other rights or interests now owned or at any time hereafter acquired by the Railway Company, for use upon or in connection with any of the above described lines of railway or property or any other line of railway, extension or branch or other property now or hereafter subject to the lien of this indenture; * * * and all dynamos, belting, engines, boilers, regulators, meters, poles, trolleys, ducts, conduits, feeders, cables, wires, switch boards, lamps and machinery for producing, generating or distributing electricity or power, and also all and singular the rolling stock, equipment, motors, engines, tenders, carriages, cars, trucks, horses, harness, tools, implements, furniture, fixtures, machinery, material, coal, wood, oil, fuel, and other supplies * * * now owned or hereafter acquired by the Railway Company for use upon or in connection with any line of railway, branch, extension or other property now or hereafter subject to the lien of this indenture; all of which personal property is hereby declared to be fixtures and appurtenances of said railroads.

Together with the tools, chattels, machinery, motors, engines and equipment of every description located in or upon the said lands and buildings or elsewhere or kept or used in connection therewith for the generation, conversion, transformation or transmission of electrical power or light or for any other purpose connected with the maintenance or operation of the above described railways or any of them, including all cables, wires, ducts, and conduits and their appurtenances for the transmission of alternating current from said prop-

erty to other power houses or sub-stations, * * * together with all and singular the tenements, hereditaments and appurtenances belonging to or in anywise appertaining to any line of railway, extension, branch or other property or properties now or hereafter subject to the lien of this indenture. * * *

Also all property of every name and nature hereafter, by delivery or by writing of any kind, for the purposes hereof pledged, assigned or transferred by the Railway Company or, with its written consent, by any one in its behalf to the Trustee, which hereby is authorized to receive any property as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of the bonds issued or to be issued hereunder, and to hold and apply any and all such property according to the terms hereof.

And also all and singular the tolls, fares, rents, issues, dividends, interest, earnings, income, profits and other benefits and advantages of, or in any wise growing out of, all or any of the said several railroads, franchises or properties, now or hereafter subject to the lien of this indenture. * * *

The Railway Company at all times will maintain, preserve and keep or cause to be maintained, preserved and kept, the mortgaged property and the property of all Controlled Companies, and every part thereof, with the rolling stock, fixtures and appurtenances, and every part and parcel thereof, whether owned, leased or operated by it, in thorough repair, working order and condition, and supplied with motive power, rolling stock, equipment, materials and supplies, and from time to time it will make or cause to be made,

all needful and proper repairs, renewals, replacements, additions, betterments and improvements thereto, so that the traffic and business of every part thereof shall at all times be conducted with safety and expedition. * * *

Unless and until, according to the provisions of Article Fourth hereof, the Trustee shall have become entitled to enter into possession of the mortgaged premises, the Railway Company shall be entitled to collect, receive and use, in its discretion, all dividends, interest and income now or hereafter payable upon all shares of stock, bonds, notes, and other obligations now or hereafter subject to this indenture. * * * The Trustee, in case of such entry (in the event of default) shall have the right to manage the mortgaged railroads, franchises and property, and to carry on the business and to exercise all the rights and powers of the Railway Company, either in the name of the Railway Company or otherwise, as the Trustee shall deem best; and it shall be entitled to collect and receive all tolls, fares, earnings, income, rents, interest, dividends, issues and profits of the mortgaged railroads, franchises and property and every part thereof, including the dividends upon all shares of stock and the interest upon all bonds, notes and other obligations subject to the lien of this indenture. After deducting the expenses of operating said railroads, franchises and property, and of conducting the business thereof and of all pairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, * * * the Trustee shall apply the moneys arising as aforesaid as follows:" (to the payment of principal and interest of bonds in default)

Stipulation as to Facts.

"Unless the proceeds of sale of any such property" (in the event of default) "shall be payable to the Trustee under said First Mortgage of The Third Avenue Railroad Company, or unless some other disposition of said proceeds be required either by reason of said mortgage or by reason of some other prior lien on the property sold, the proceeds of any such sale, * * * shall be received and set apart by the Trustee, * * *" (for certain described purposes) "or to pay for additions or betterments or improvements of the mortgaged railroads, franchises or property, or to the purchase of equipment for use thereon, which additions, betterments, improvement and equipment shall likewise be subjected to the lien of this indenture, or to reimburse the Railway Company for expenditures certified in writing by its treasurer or assistant treasurer to have been made by it for said purposes or any of them."

Exhibit "D" Annexed to Stipulation as to Facts and Exhibit 3 at Hearing Dated October 22, 1956.

Notice of Motion of Trustees for Order Authorizing Payment for 25 Fareboxes Purchased and Purchase of 449 Additional Fareboxes From Johnson Farebox Company.

(1)

SIRS:

TAKE NOTICE, that on the annexed petition of I. Howard Lehman, Lester T. Doyle, and James Hodes, verified September 1, 1949, the undersigned will move this Court at a hearing to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on September 7, 1949, at 10:30 A. M., or as soon thereafter as counsel can be heard, for an order in the form hereto annexed, authorizing I. Howard Lehman, Lester T. Doyle and James Hodes as Trustees of Surface Transportation Corporation of New York to pay for 25 Johnson fareboxes purchased in August and to purchase 334 additional fareboxes, and as Trustees of Westchester Street Transportation Company, Inc. to purchase 115 fareboxes from the Johnson Farebox Company, upon the terms set forth in the annexed petition; and for such other and further relief as to the Court may seem just and proper.

New York, N. Y., September 2, 1949.

SAXE, BACON & O'SHEA,
Attorneys for Trustees,
102 Maiden Lane,
New York 5, N. Y.

To:

The attorneys for all parties who
have filed notices of appearance herein.

Sept. 7, 1949

Respectfully referred to Judge Kaufman.

EDWARD A. CONGER,
U. S. D. J.

Motion granted. Order signed Sept. 8, 1949.

SAMUEL H. KAUFMAN,
U. S. D. J.

Exhibit "D" Annexed to Stipulation as to Facts.

Order Authorizing Trustees to Pay for 25 Fareboxes Purchased and to Purchase 449 Additional Fareboxes From Johnson Farebox Company.

(2)

Upon the petition of I. Howard Lehman, Lester T. Doyle and James Hodes, Trustees of debtors Surface Transportation Corporation of New York and Westchester Street Transportation Company, Inc., verified September 1, 1949, and the notice of motion thereto annexed dated September 2, 1949, and said petition and notice of motion having been duly served, and after the hearing on said petition, and sufficient reason appearing therefor, it is hereby

ORDERED, that the Trustees of debtor Surface Transportation Corporation of New York be and they hereby are authorized to pay Johnson Farebox Company the sum of $6,213.00, being the purchase price of 25 fareboxes received by said Trustees in August, 1949; and it is further

ORDERED, that the Trustees of debtor Surface Transportation Corporation of New York be and they hereby are authorized to purchase an additional 334 fareboxes from the Johnson Farebox Company for the sum of $83,005.68; and it is further

ORDERED, that the Trustees of Westchester Street Transportation Company, Inc. be and they hereby are authorized to purchase 115 fareboxes from the Johnson Farebox Company for the sum of $28,055.40.

New York, N. Y., September 8, 1949.

SAMUEL H. KAUFMAN,
U. S. D. J.

Exhibit "D" Annexed to Stipulation as to Facts.

Petition by Trustees for Order Authorizing Payment for 25 Fareboxes Purchased and Purchase of 449 Additional Fareboxes From Johnson Farebox Company.

(3)

To Honorable Samuel H. Kaufman, Judge of the United States District Court for the Southern District of New York:

The petition of I. Howard Lehman, Lester T. Doyle and James Hodes, respectfully shows:

1. Your petitioners are the duly appointed, qualified and acting Trustees of the above named debtors.

2. By the orders of their appointment dated June 21, 1949, as resettled, your petitioners were authorized and directed to continue the business of the debtors in the operation of street transportation facilities and your petitioners have been continuing such operations.

3. Your petitioners operate 68 bus routes in Manhattan, The Bronx and Westchester County, with a total route mileage of approximately 331 miles, and 12 trolley routes in The Bronx and Westchester County with a total route mileage of 36 miles. In connection with these operations your petitioners use approximately 1,000 buses and 84 street cars.

4. Prior to the institution of a fare higher than 5¢, all buses operated by the debtors were equipped with a so-called "J" type of (4) farebox. These boxes were so constructed that a nickel inserted therein would register as one fare and a dime as two fares. When a 7¢ fare was instituted on the debtors' buses, a tray was provided upon which the passenger dropped two pennies and inserted the

nickel in the farebox. Accordingly, at the end of each day's run the bus operator was required to turn in to the debtors 7¢ for every fare registered on the box. However, due to unfamiliarity or thoughtlessness on the part of the passengers, a certain percentage of passengers would insert the total fare in the box, which then registered five fares, since a penny registered two fares as did a dime. Considerable confusion developed with respect to the number of fares for which each bus operator should account. As a result, Division Superintendents of the debtors were authorized to refund to the bus operators the amounts erroneously registered, provided the operator made a claim and signed an appropriate refund slip.

5. In order to offset the inevitable increase in the number of fares registered in the box by such insertion of pennies, a percentage of the bus operators adopted the practice of taking certain fares "over the box" instead of having the fares inserted in the box. In the course of the last several months, as a result of investigations by debtors' inspectors, a number of bus operators were suspended for this practice. The union representing the operators has protested to the Trustees that the basic cause of this trouble was the failure of the debtors to provide proper fare collection devices.

6. In addition to the foregoing, it was recognized by the debtors that the method of collecting the pennies in a tray imposes an additional burden on the bus operators and also slows down the entrance of passengers into the buses. Consequently, the debtors made a survey of the market for the most practical farebox equipment for the collection of fares involving more than one coin or tokens. Debtors found that the Johnson farebox was the most suitable box

and that it was used by the Board of Transportation of the City of New York and other privately owned bus lines in this City.

7. On February 8, 1949, as a result of such survey, debtor Surface Transportation Corporation of New York (hereinafter called "Surface") placed an order with the Johnson Farebox Company for 450 boxes. At that time the debtors were using 400 of this type of box which had been borowed from the City of New York for use on the debtors' lines where combination subway-bus tickets were being sold. The Johnson Farebox Company delivered 226 boxes to the debtors up to June 21, 1949. In August that company delivered an additional 25 boxes to the Trustees.

(5) 8. At the time of placing the order for said 450 boxes, Surface recognized that an additional order would have to be placed at a later date, inasmuch as a total of 850 boxes (including those belonging to the City of New York) would not provide an adequate margin of reserve for boxes out of order. The need for additional boxes has been further accentuated by the recent purchase of 25 new buses by Surface for use in the City of New York.

9. At the time of the institution of a 7¢ fare on the lines of debtor Westchester Street Transportation Company, Inc. (hereinafter called "Westchester Street"), it placed an order with the Johnson Farebox Company for 115 of such boxes.

10. As a result of a study of the requirements of the debtors in this respect, your petitioners and the operating officers of the debtors are of the opinion that it is necessary to obtain an additional 334 boxes at a cost of $83,005.68 for use by Surface, and 115 boxes at a cost of

$28,055.40 for use by Westchester Street. These estimated requirements include the number of undelivered boxes covered in the purchase orders hereinabove referred to. The price for each box, which is standard for all purchasers, is $228, plus 7% Federal tax; and, if boxes are delivered for use in the City of New York, 2% New York City Sales Tax.

11. Your petitioners have been advised by the Johnson Farebox Company that in the event they receive such an order from your Trustees, deliveries will be made commencing approximately six weeks after the order is placed, at the rate of approximately 50 boxes per week.

12. At the present time debtor Surface owes to the Johnson Farebox Company the sum of $43,481. representing the cost of the 226 boxes delivered to said debtor prior to June 21, 1949; and in addition your petitioners are obligated to pay said company the sum of $6,213. representing the cost of the 25 boxes delivered to your petitioners in August 1949 as set forth.

WHEREFORE, your petitioners pray that an order be entered herein authorizing them (a) as Trustees of Surface Transportation Corporation of New York to pay Johnson Farebox Company $6,213., being the purchase price of the 25 boxes received in August 1949; (b) as Trustees of Surface Transportation Corporation of New York to purchase 334 fareboxes from the Johnson Farebox Company for the sum of $83,005.68 inclusive of Federal and New York City taxes; and (c) as Trustees of Westchester Street Transportation Company, Inc., to pur- (6) chase 115 fareboxes from the Johnson Farebox Company for the sum of $28,-055.40 inclusive of Federal taxes; and granting such other

and further relief as to the Court may seem just and proper.

I. Howard Lehman
Lester T. Doyle
James Hodes
Petitioners-Trustees.

Saxe, Bacon & O'Shea,
Attorneys for Petitioners, by

William J.
A Member of the Firm,
102 Maiden Lane,
New York 5, N. Y.

Southern District of New York }
State of New York } ss.:
County of New York }

We, I. Howard Lehman, Lester T. Doyle and James Hodes, the petitioners named in the foregoing petition, do hereby severally make solemn oath that the statements contained therein are true to the best of our knowledge, information and belief.

I. Howard Lehman
Lester T. Doyle
James Hodes

Subscribed and sworn to before me }
September 1st, 1949. }

Max Regov,
Notary Public,
State of New York.
Qualified in Bronx County.
No. 03-3233500.
Certs. filed: Bx. Reg.; N. Y. Co. Clk. and Reg.; Kings. Co. Clk. and Reg.; Westchester Co.
Term expires March 30, 1951.

Testimony

(14) IN THE MATTER

of

THIRD AVENUE TRANSIT CORPORATION.

New York, October 22, 1956,
10:30 o'clock a. m.

Present: Mr. BURNS,
Mr. KISER,
Mr. BANDLER,
Mr. LORENZ.

* * * * *

Also at this time, your Honor, we have on the agenda the matter of the claim for priority as a six months claim of Johnson Fare Box Company. Mr. Lorenz is here this morning and I am told that he is ready to proceed.

(30) The Court: Mr. Lorenz.

Mr. Lorenz: May it please the Court, I have here a stipulation that was entered into a few days ago with the attorneys for the trustee as to most of the facts in the situation, and I ask that it be marked Exhibit 1.

Mr. Kiser: Your Honor, may the record show that the stipulation was entered into with the reservation to object to the materiality and the relevancy of a number of statements contained therein, and in the argument and in our memorandum we will point out to your Honor the grounds for such a reservation.

(Marked Johnson Exhibit 1.)

Mr. Lorenz: In that stipulation, your Honor, there is reference to a number of mortgages which are attached thereto as exhibits but I have agreed with counsel for the

trustee that since those mortgages and indentures are already in evidence in the proceeding that they may be deemed as annexed to the previous stipulation of facts although they are not actually attached.

The Court: Very well.

Mr. Lorenz: Your Honor, this proceeding concerns the purchase price of a number of fare boxes (31) which had been supplied by Johnson Fare Box Company to the debtors in possession. They had been supplied in 1949 within a period of six months prior to the appointment of the trustee. The amount involved, the amount which is left unpaid, is something over $43,000 for which the trustee, rather, for which the claimant claims a priority.

The Court: What is the unpaid balance?

Mr. Lorenz: $43,533.84 as the unpaid balance. By the way, Mr. Kiser, have you our claim, our proof of claim? I don't know whether it is before the Court or not.

(Mr. Kiser hands paper to Mr. Lorenz.)

Mr. Lorenz: Will your Honor excuse me a moment?

The Court: Yes.

(Short pause.)

Mr. Lorenz: The original of our claim is on file with the trustee and if I may be permitted to hand up this copy for the convenience of the Court, I would be glad to do so.

Mr. Kiser: No objection.

Mr. Lorenz: And I suggest that it be marked Exhibit 2.

(32) (Marked Johnson Exhibit 2.)

Mr. Lorenz: Prior to the time that the 7 cents fare was granted on November 28, 1948, the debtor had used a form of fare box which they also bought from Johnson Fare Box Company over a period of years. I think those fare boxes were known as the J fare boxes. The debtors

had been purchasing fare boxes from Johnson for many, many years, certainly since before 1940, and I think from 1936.

I want to state that the terms of payment—and I believe this is of paramount importance in the situation—the terms of payment from 1940 have been on the basis of thirty days, one per cent discount, if paid in cash. Obviously it was on a current basis, and it was clear, even with respect to the fare boxes here involved, and as stated in the stipulation, that the debtors had asked for extended terms of credit and that those terms of credit had been refused, so that there is no intention on the part of Johnson Fare Box Company to extend long term credits for these fare boxes.

The Court: They could take off one per cent if they paid within thirty days?

Mr. Lorenz: Yes. Prior to 1940, as I (33) have been informed by Mr. Kiser, they were permitted to take off two per cent if they paid before thirty days.

Mr. Kiser: Ten days.

Mr. Lorenz: Or if they paid within ten days.

Mr. Kiser: It was net thirty days.

Mr. Lorenz: Net thirty days?

Mr. Kiser: Yes.

Mr. Lorenz: Now up to September 22, 1948, as I have stated, the fare on the lines was 5 cents. On November 28, 1948, a 7-cent fare was instituted on the buses. When the increased fare was instituted, in addition to the fare boxes, a tray was supplied for the delivery and the payment of the pennies by the passengers. In other words, if the entire fare was deposited in the fare boxes it registered not one fare for which the conductor was required to account but five fares because each penny registered a fare, just as a dime would. So that the situation was entirely confusing in that if the proper fare was deposited in the fare box, five fares were registered and not one.

Colloquy.

The conductor was permitted to make an (34) application to the superintendents of the respective lines for reimbursement of the additional sums which were shown to have been owing by him to the lines as registered in the fare box, and that, of course, was a troublesome and onerous thing to do.

As a matter of fact—and I think this is of vital importance—many operators of the buses got into the habit instead of taking the money over the tray or on the tray, because many of the passengers due to unfamiliarity with the system, deposited the entire seven cents in the box which would register five fares, and they took the fare over the boxes. In other words, they themselves received the entire amount and apparently there was no way of checking up as to what amount they had received, and I think that there was a large amount of trouble on the part of the lines as a result of that.

As a matter of fact, the superintendents of the respective lines made an investigation of the situation and a number of operators were suspended because they took fares over the box. The union—

The Court: I might get a lot more out of (35) this if I knew what the basis of the objection was that this is not a proper six months claim.

Mr. Kiser: Your Honor, the basis of our objection that this is not a six months claim is that the claim is not a current expense in the ordinary operations within the meaning of the six months rule in any sense of the word. It is a claim for the unpaid purchase price of fixed capital items and therefore is not a six months claim under that rule.

The Court: Thank you. Go ahead, Mr. Lorenz.

Mr. Lorenz: Directing my attention to that statement for a moment, we claim that the facts and circumstances

show that for all practical intents and purposes these were necessary changes which were made for the ordinary operation of the line, and we have a number of cases which show that it doesn't make any difference whether or not, as the trustee says, that these were handled as capital items on their books or not. We certainly intended them to be a matter of merchandise to be paid for currently.

The Court: Your position would be that if they had a power house or a garage and there was (36) a hurricane and it blew it down and they had to put up something so that they could operate their buses, that that would be a current expense; is that right?

Mr. Lorenz: Well, I do not have to go even that far with respect to a car barn blowing down, although some cases have gone so far as to say that even though a bridge is necessary, a new bridge is necessary to continue the safe and reasonable operation of a railroad, that under those circumstances that could be deemed as coming under the six months rule.

The specific case that I have in mind in that regard is the case of Continental Trust Company vs. Bonsal, in which certiorari was denied in 293 U. S. 634. Unfortunately I do not have the Federal Circuit—yes, it is 72 Fed. (2d) 975.

And in some cases rails in very considerable quantities were purchased by a railroad and were deemed necessary. That is the famous case of Southern Railway Co. vs. Carnegie Steel Co., 175 U. S. 257.

I think that the case, our case, is a fortiori stronger than the situation which your Honor has mentioned; that it is clear that these things were used, (37) as the stipulation shows, in the ordinary operations of the company. They were not new fare boxes; they were replacement fare boxes. They were intended as replacements. They were used as replacements and solely as replacements. I want to emphasize that.

Colloquy.

In the Bonsal case the very question which Mr. Kiser has raised was discussed, and in many other cases they say that the mere fact that a Public Service Commission or even the ordinary accountant might consider these things as capital items which may be depreciated is not decisive of the question at all, and it has been so held by many courts.

And I believe that is our situation. In other words, this is just a situation similar to the subway when the fares were changed from five cents to ten cents and a man was required to stay there and accept dimes in a tray instead of nickels in the slot. Now that may be a more extreme situation than the one here but in essence it is essentially the same. And when we say that it was necessary for the continued operation of the lines, it was necessary from all practical points of view.

The union stated that the reason these errors were made and that these situations were created (38) by which the motorman took the fares over the box was due to the fact that there not proper fare boxes installed in the line. And I think that that also is in the stipulation of facts which I have presented to your Honor.

Now it is interesting to note that during this period 400 fare boxes of this kind which we furnished during the period in question were borrowed by the transit company from the city and used for the operation, the joint operation of the city and the bus lines.

Now I think that perhaps one of the most important aspects in the situation is that on September 2, 1949, just two months I think after the trustees were employed or were appointed, an application was made by the trustees of the lines to do several things, to pay for certain fare boxes which were delivered by Johnson in August 1949 apparently without any specific authorization from the court, and they requested that they pay for them because

they had been delivered. The situation there is precisely the same as these except that they were delivered after the appointment of the trustee, and in addition they asked for authority to buy 334 more of these boxes (39) in addition to those which had been delivered, obviously because they deemed it necessary for the operation of the lines, and in addition to that 150 still more fare boxes for the Westchester Line, making a total of almost 500 additional boxes which they ordered from Johnson after the trustees or immediately after the trustees were appointed.

Many cases have held that where a receiver or a trustee acts in that way immediately after his appointment it shows pretty definitively that these were necessary for the continued operation of the line.

I have here the application of the trustees for the permission to make those additional purchases.

It is annexed as an exhibit to the petition. I hand it up to your Honor, and the facts which I have stated to you are almost verbatim from this petition. It is referred to in the petition as an exhibit and I ask also that it be marked.

(Marked Johnson Exhibit 3.)

Mr. Lorenz: I also want to point out what I think is an important fact, and that is that prior to the appointment of the trustee this line or these lines were under the jurisdiction of the court. (40) There was also the Securities and Exchange Commission which was interested. There was also the City of New York which was interested. The Public Service Commission was also interested. They must have known that Johnson was furnishing fare boxes to enable the company to operate in a reasonable way. No objection was ever made to the

acquisition of these fare boxes while the companies were under the jurisdiction of the court. In fact, no receiver had ever been appointed by the court. And when a receiver—when an application for a receiver was made in June 1949 the court refused to appoint a receiver in the situation, and the statute says that no purchases shall be made by the company except in ordinary operations of the business.

By stipulation here it was agreed that these fare boxes were purchased before and used in the ordinary operation of the business. I think that really, wholly apart from the six months rule, that these were really purchases made by the debtors, who then happened to be in possession, for the preservation, the reasonable preservation of the system and the property, and also the fact that the purchases were made within the six months period.

(41) So that under the circumstances I think that since the mortgagee has received the benefits of these additional fare boxes, since nobody has been hurt by them, since they were furnished in entirely good faith to allow the company to operate under the 7 cents fare which they couldn't operate in the usual way since—as a matter of fact although it is not stated in the stipulation, not only did the union say that the reason for the difficulty was that there was not a proper fare box but that there would be a strike if additional fare boxes of the kind furnished by Johnson Fare Box were not purchased.

So it seems to me, your Honor, that a clear case is made out for the application of the priority principle under the six months rule. And I might say that I understand that the trustees have set aside more than enough money to cover this six months claim as well as others which your Honor has heretofore allowed.

This whole question came up, as a matter of fact, in an application many years ago before the court, before a

referee. It was heard before a referee, briefs were prepared for the referee and apparently it was never submitted on behalf of the trustee.

(42) So I ask your Honor to grant our application.

The Court: Did the Johnson Fare Box Company furnish any fare boxes before the beginning of the six months period which were not paid?

Mr. Lorenz: Oh, yes, they did.

The Court: And as to those you have a general claim for them?

Mr. Lorenz: Well, to that extent, we are not making any claim for that. For many years—

The Court: I didn't mean that. I mean did you furnish any for which you were unpaid?

Mr. Lorenz: I don't know, your Honor. I think that they were all paid. They have all been paid but I wouldn't make any claim for those because of the court's general disposition to not allow the priority principle to go beyond six months.

The Court: Still if you are right about your point it doesn't make any difference whether it is six months or not as long as—

Mr. Lorenz: I don't think they are in a substantial amount in any event and that is not something we are making a claim for before your Honor.

Perhaps Mr. Ellis can tell us whether there (43) have been any furnished prior to the six months period which are still unpaid. That is what the Court is referring to now.

Mr. Ellis: No, there are none for which payment has not been made.

Mr. Lorenz: Thank you.

Mr. Kiser: Your Honor, if I may address myself first to the relevancy of Mr. Lorenz's references to the proceeding before the referee, those proceedings have nothing

to do with the classification of Mr. Lorenz's claim. That was a supplementary proceeding and at the time $12,000 was paid to Johnson Fare Box Company during the pendency of the reorganization proceeding. Similarly, the fact that they were paid something on acount between the time the petition was filed and the trustee appointed is equally irrelevant to this proceeding. Substantially all of the proceedings before the referee were settled and the only two which weren't, the referee had not seen fit to decide them, and we hadn't pressed the referee for decision, and to my knowledge neither have the other parties to the proceeding. They refer solely to the validity of the payment made during the pendency of the involuntary (44) proceeding before the referee was appointed.

Now there are two questions here with which I think your Honor is principally concerned. Your Honor suggested a question to Mr. Lorenz whether he was contending that his situation was comparable to one where a roof had blown off the property and he mentioned a situation where a bridge had been washed away.

Now I would contend that there is nothing in the record before your Honor to support any claim of necessity in that situation. It is conceded that the bridge had not been blown away. It is conceded that the acquisition of these boxes tended to create a more efficient operation. It is equally clear, however, from the record that there was never any stoppage of operations even though, as Mr. Lorenz has just told you, all the boxes were not acquired during the period and delivered to the debtor. I believe the papers will show that only 226 out of the 450 were delivered, and they will also show that many more were acquired later on. So that while they certainly contributed to the efficiency of the operations there was no necessity in the sense—

Colloquy.

The Court: What is your point, that if they (45) were necessary every bus would have had to be equipped with them and if they were equipped gradually that it wasn't necessary?

Mr. Kiser: Yes. If they were necessary in the sense of a roof having been blown off in a hurricane or a bridge having been out on a railway, if it were necessary in that sense as distinguished from necessary to a most efficient operation. However, that is not the critical point here because the doctrine of necessity is a very limited one, and I think that the cases will show, your Honor, that it means actual necessity rather than desirability.

Passing then from the point of necessity to the more normal and usual application of the six months rule, the cases, and I will not say uniformly hold because there are cases within this field, I think, as your Honor will recall, supporting almost any proposition. That is to say on occasions some courts have been quite liberal in extending the doctrine, but, as most of the cases define the rule, six months claims are claims for current expenses. Our position is that it never was an expense claim and that it couldn't be an expense claim. I think (46) Mr. Lorenz stated it accurately when he stated the claim to be for the unpaid balance of the purchase price of fare boxes, and I would like to ask Mr. Ellis a few questions just to get on the record from an accounting point of view the nature of these transactions.

Mr. Ellis, will you take the stand.

James T. Ellis—For Trustee—Direct.

JAMES T. ELLIS, having been previously sworn, called as a witness on behalf of the trustee, testified as follows:

Direct Examination by Mr. Kiser:

Q. Mr. Ellis, are you employed by the trustee in reorganization? A. Yes, I am.

Q. In what capacity? A. As comptroller.

Q. And were you previously employed by the debtor corporation prior to the appointment of the trustee? A. I was.

Q. And in what capacity? A. First as accounting consultant and later on as vice president and treasurer of the company.

(47) Q. When did you first come with the company? A. October 1, 1948.

Q. You are a certified public accountant of the State of New York? A. Yes, I am.

Q. Are you familiar with the facts and circumstances surrounding this claim? A. Yes.

Q. Mr. Ellis, I ask you, is the claim of Johnson Fare Box Company a claim for current expenses of ordinary operations?

Mr. Lorenz: Your Honor, I object to the question.
The Court: Yes, the objection is sustained.

Q. Mr. Ellis, as an accountant, how would you characterize the claim of Johnson Fare Box Company? A. It is a claim for the payment of the purchase price of fixed assets except for the sum of $42.84.

Q. Now, Mr. Ellis, tell us how the sum of $42.84, how that much of the claim differs from the balance of the claim of $43,533.84? A. That is the cost of 15 housings for lights used in connection with the fare boxes. Under normal (48) circumstances those items would not be capitalized. They would be charged to materials and sup-

plies and drawn out and used to install—used out as part of the installation of the lights in the boxes.

Q. Would you describe in some detail the accounting transactions or bookkeeping transactions which took place with respect to the $42.84 item and with respect to the balance?

Mr. Lorenz: Your Honor, I do not believe that is relevant to the situation and certainly it is not determinative of the situation because the Court of Appeals has said that even though they may be depreciated, even though a public service body may demand that they be depreciated, even though they may be deemed as capital items on their books, it is not determinative of the situation. If the matters are to be paid within a short time without the extension of long term credit of any kind they are to be regarded as current liabilities.

The Court: You are not saying that that is an inflexible rule of law—

Mr. Lorenz: No, the courts have repeatedly so stated.

The Court: That it is of no moment whether (49) these are capital expenditures or current expenditures?

Mr. Lorenz: Did I say it is of no moment?

The Court: You cannot say that there is any such position and so it is admissible in evidence.

Q. What is your answer, Mr. Ellis? A. On the purchase of items such as were represented by the bills for $42.84, we would charge inventory of materials and supplies and credit accounts payable. On payment of the bill we would charge accounts payable and credit cash to record the disbursement of the cash and payment of the bill. On the purchase of the –

Q. If I may interrupt you, Mr. Ellis, on the payment of the sum of $42.84 there would be a charge to expense in

that sum, would there not? A. Not necessarily; it would be a charge against the accounts payable account to wipe that out. When the item was taken out of inventory materials and supplies and used on the boxes it would then be charged to expense. It is an item of the type such as is represented by the $42.84 charge. On the fare box purchases, such as the first item of $6,213, that would be charged to fixed capital property in (50) the service and an account payable would be set up at the time of the purchase. When the bill was paid the accounts payable would be charged and cash would be credited. The cost of the fare box itself would remain in the operating property and service account until such time as it was retired from service.

Q. You testified, Mr. Ellis, that an account would be set up I believe on the assets side which you say was fixed assets? A. Fixed assets operating property.

Q. Would that be depreciated over a period of years? A. Yes, it would.

Q. And what would the period of years be from 1948? A. Ten years. We are using a ten-year write-off period for all fare box equipment.

Mr. Kiser: Thank you, Mr. Ellis.

Cross Examination by Mr. Lorenz:

Q. There is no doubt in your mind, Mr. Ellis, is there, that this is a current liability of the company? A. There is no doubt that it was set up as a current liability at the time of the purchase, that is (51) right.

Q. Immediately at the time of the purchase it was a current liability? A. Yes, it was.

Q. And no long term credit was granted by the Johnson Fare Box Company, was it? A. That is correct.

Q. And these fare boxes were used, were they not, to replace existing fare boxes which had become not prac-

ticable because of the increase to the 7 cents fare, isn't that right? A. Yes, they were used to replace the J boxes which did not perform satisfactorily with a fare involving the collection of pennies.

Q. And they were not purchased for inventory purposes, were they? A. No, they were not except that some of them were reserved and some were not. They were kept in reserve to replace broken boxes and boxes that failed in service.

Q. But, as a matter of fact, you did not even have enough for the existing boxes that were in use, did you? A. We didn't in this purchase, no.

(52) Q. Did you in any other purchase? A. Well, we purchased some from the City of New York.

Q. You borrowed them from the City of New York, didn't you, four hundred of them? A. We borrowed them originally and then entered into a lease purchase arrangement.

Q. When was that? A. I think the lease purchase arrangement was in 1950 but it may have been late 1949.

Q. Did you read the application for permission to borrow these boxes in which it is stated explicitly that these were borrowed from the City of New York? A. They were borrowed originally and then we entered into a purchase lease arrangement at a later date, I believe after the appointment of the trustee.

Q. After the appointment of the trustee? A. Yes.

Mr. Lorenz: That is all, Mr. Ellis.

(Witness excused.)

Mr. Lorenz: I just want to read to your Honor a statement. I am not sure whether it is an exact quotation but it is close enough to be, in the (53) Bonsal case it says that the fact that it was charged to capital accounts under the I.C.C. rule does not prevent the expenditure from being a current expense, and it cited Virginia and Alabama Coal Company, 170 U. S. 355.

Colloquy.

The Court: I see that I have a question of law to decide.

Mr. Lorenz: I think it is primarily a question of law.

Mr. Kiser: Your Honor, I think we would both like some time to submit to your Honor all the precedents which we think will have some bearing on this matter and I was wondering if I could suggest that your Honor direct that we exchange our main briefs in ten days with five days additional for replies, if that meets with your Honor's convenience.

I believe you said that was satisfactory to you, Mr. Lorenz?

Mr. Lorenz: Yes.

The Court: All right, so ordered.

Mr. Kiser: Thank you very much.

Mr. Lorenz: I might say in response to your Honor's statement as to whether this is a question of law, it is a question of law in which the (54) discretion of the Chancellor is invoked to a considerable degree, because the courts have many times said you must consider all the facts in each specific situation. I don't think that there is any alchemy in the word "necessary" or in the question of reasonable necessity from the point of view of efficient operation in my opinion.

The Court: I have discovered that this is a very difficult field of the law because there doesn't seem to be any guiding principle and it is largely a matter of precedent so far as I am concerned. I don't know of any other way to decide the case as long as no principles are involved, and it would be either leaving the money in the pockets of the securityholders or taking it out of their pockets and putting it into the pockets of the Johnson Fare Box Company.

Mr. Lorenz: The securityholders have benefited by these additional fare boxes.

The Court: But that is true in every case except the case of an improvident purchase, Mr. Lorenz.

Colloquy.

Mr. Lorenz: Many cases have held that where the securities of the mortgages are preserved by this purchase that under those circumstances the priority is granted. We will have some of those cases for your (55) Honor.

I understand the shadowy line in the picture full well. We have struggled with the situation for a long time but I think you should certainly consider whether or not from an equitable point of view the interests of the security-holders have been safeguarded by the purchase. As to an improvident purchase the situation is different and we know that full well, but still where a securityholder is protected in his security by the purchase and I submit that they have benefited by the purchase, under those circumstances there is no sufficient reason why they should be protected as against the Johnson Fare Box Company who did supply these fare boxes at the urgent request of the trustee.

When they state that we did not furnish fare boxes during the period the principal reason was that we couldn't supply them quickly enough. The application says that they will have to order additional fare boxes to cover the boxes on hand, and everything must be considered in the light of the circumstances. If it was necessary that it be done it had to be done quickly, so that the union would be satisfied, and it was admitted that it would (56) load up the operation of the line and I imagine that it necessarily involved some concomitant danger in operation. It did not only involve additional obligations on the part of the motormen but it involved all sorts of hazards as to the efficiency of the line and I think its safety and the safety of the passengers. And under those circumstances it seems to me that the company was provident in ordering the fare boxes and I think that the trustees were provident in immediately—and when I say immediately I mean a month or two after the appointment, in not only ordering the ones which had been delivered but still an additional number,

and in addition to that they paid for 25, recognizing the urgency of the situation, and that urgency is something which the Court ought to recognize as an important factor in consideration of the question of law which is before it.

So when you say that it is a question of law, I agree that it is a question of law depending upon the facts which are presented underlying the law.

Mr. Kiser: I think that Mr. Lorenz went considerably outside the scope of the situation and I think he may have inadvertently said something which on futher reflection he will withdraw. Mr. (57) Lorenz, I believe you said that the Johnson Fare Box Company delivered these boxes just as fast as they could in response to Third Avenue's order.

Is it not a fact that on one occasion Johnson Fare Box stopped boxes in transit on the way to Third Avenue and generally slowed down all deliveries because of Third Avenue's slowness in payments?

Mr. Lorenz: I don't think that I have to retract anything that is true. At one time when there was a delay in payment of their obligations, their current obligations, we stopped the delivery in transit and immediately upon payment we delivered them. We delivered those which had been stopped and I think that the fact that in their desperate financial situation they paid the obligation when they saw that we were refusing to deliver them unless they paid, shows the current nature and the immediate nature of the obligation.

The Court: That is represented by the payment on account of about twelve thousand dollars?

Mr. Lorenz: Yes, that is right.

The Court: All right, we will consider the matter submitted except for briefs.

Mr. Kiser: Thank you.

Memorandum.

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Bimock, D. J.:

Johnson Fare Box Company disputes the Trustee's failure to classify the liability to it as a "six-months claim". In the Trustee's proposed plan of reorganization "six months claims" are described, in Article I, as follows:

> "Six months claims: All claims, as defined, which are entitled to priority consisting mainly of claims for current expenses of ordinary operations incurred by the debtors without the extension of long term credit and within six months prior to the appointment of the Trustee in reorganization proceedings."

The parties have stipulated most of the facts. Johnson Fare Box has filed claims against the debtors Surface Transportation Corporation of New York (hereinafter Surface) and Third Avenue Transit Corporation in the amount of $43,533.84 for the unpaid balance on the purchase price of 225 new fare boxes delivered between February 7, 1949 and June 10, 1949. The Trustee now concedes that $42.84 of this amount is entitled to classification as a six months claim. The amount now remaining classification of which is in dispute is $43,491.00.

The fare upon the debtors' buses, was 5¢ until September 22, 1948. Prior to that date all buses operated (253) by them were equipped with a so-called "J" type of fare box. These boxes were so constructed that a nickel inserted therein would register as one fare and a dime as two fares. If a penny were dropped in it also would register as two fares. On September 22, 1948, the fare was raised to 6¢ and, on November 28, 1948, to 7¢.

Memorandum.

The expedient of collecting the extra pennies on a tray beside the fare box proved entirely inadequate. Passengers would drop the pennies into the fare box where each would register two fares as if it were a dime so that if 7¢ were dropped in five fares would be registered. This involved claims for refund by the bus operators and also attempts by the bus operators to square accounts by accepting fare "over the box" instead of in it. The substitution of boxes which would register the pennies therefore became imperative and on February 8, 1949, Surface placed an order with Johnson for 450 fare boxes at a cost of $228 per box.

The claim here put forward as qualifying for the six months class is for the purchase price of 225 of the fare boxes so ordered.

The contested classification of claims as non-priority claims was before the District Court on a prior application in this proceeding. In Re Third Avenue Transit Corporation, 138 F. Supp. 623, aff'd on opinion below, 230 F. 2d 425. In that opinion the District Court quoted at page 625 and used as a rule a statement by Franklin W. M. Cutcheon, Esq. as reported by Fitzgibbon in his "The Present Status of the Six Months Rule", 34 Col. Law Rev. 230, 234-235. I will use the same statement as the rule for the decision of this application. It follows:

> "Debts contracted by the railroad company within a reasonably short time prior to a receivership, whether under a foreclosure bill or a creditor's bill, that is to say, within a period, usually fixed at six months * * * for labor, supplies or material or repairs necessary (254) for the operation of the railroad as a going concern, if it does not appear that credit was given in reliance upon the railroad company's personal credit or some special security, are preferred over

the lien of a mortgage and the claims of bondholders as to net income, whether that of the railroad company or that of its receivers, even if necessary as to income impounded by the mortgage trustee. * * *

"Debts of the railroad company for money loaned, for new construction, for general reconstruction (as distinguished from repairs), for the purchase of land and right of way, for additions and betterments which are not chargeable to operation, for the purchase of new equipment, for so-called car rentals payable under equipment trust agreements, for rentals under leases, for guarantees of securities of other corporations and for tort claims do not fall within the class of preferred claims, even as to surplus income, unless some special equity attaches to the claim."

Applying the above quoted rule, the fare boxes were not "labor, supplies or material" but rather "new equipment".

The liability is classified to the extent of $42.84 as a six months claim. As to the balance, classification as a six months claim is denied.

E. J. Dimock,
United States District Judge.

Notice of Appeal.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

NOTICE is hereby given that Johnson Fare Box Company, claimant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the memorandum order of this Court entered on March 15, 1957, denying the classification of its claim against Surface Transportation Corporation of New York and Third Avenue Transit Corporation herein in the sum of $43,533.84 (except as to the sum of $42.84), as a six months' priority claim.

Dated: New York, May 10, 1957.

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